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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/047,411	01/16/2002	Erik Thurman Donhowe		5293
36489	7590	12/23/2005		
LEYENDECKER LEMIRE & DALEY, LLC C/O PORTFOLIO IP P.O BOX 52057 MINNEAPOLIS, MN 55402				
			EXAMINER KUHN, SARAH LOUISE	
			ART UNIT	PAPER NUMBER
			1761	

DATE MAILED: 12/23/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

10/047,411

Applicant(s)

DONHOWE, ERIK THURMAN

Examiner

Sarah L. Kuhns

Art Unit

1761

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 31 October 2005.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 16-28 and 33-35 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 16-28 and 33-35 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
 - ☐ Certified copies of the priority documents have been received in Application No. _____.
 - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|---|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____ |

DETAILED ACTION

The finality of the Office Action of April 13, 2004, is withdrawn to allow the introduction of the new ground of rejection below. Any delay is regretted.

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

The Examiner would like to apologize for the offensive nature of the "Pass the Gas" reference relied on below.

Claim Rejections - 35 USC § 102

Claims 33 and 35 are rejected under 35 U.S.C. 102(b) as being anticipated by Sfat et al., U.S. Patent 3,711,292. Sfat discloses a beverage comprising 4.14% alcohol and 0.34% hydrolyzed protein (see Table III) wherein the beverage is substantially clear and transparent. Sfat discloses the beverage to be beer that is inherently carbonated.

Claim Rejections - 35 USC § 103

Claims 16- 28 and 33-35 are rejected under 35 U.S.C. 103(a) as being unpatentable over Carieri, U.S. Patent 5,378,480 in view of Optimum Nutrition and "Pass the Gas."

In regard to claims 16, 27 and 33-35, Carieri discloses a non-brewed beverage comprising 60 to 99.5% water by volume (column 2, lines 26-30), about 8.5 g of hydrolyzed protein per liter (column 3, line 57, 3 grams of protein/serving; column 2, lines 22-23, serving size of 12 ounces which is 0.355 L), and 100% of the recommended daily allowance of Vitamin C (column 3, line 64-column 4, line 7). Absent a showing to the contrary by clear and convincing evidence, it would be expected that the beverage of Carieri would be substantially clear and translucent when mixed with a substantially clear and translucent liquid. Optimum Nutrition also discloses beverages with the claimed water, hydrolyzed protein and vitamin contents that, absent a showing to the contrary, would be expected to be substantially clear and translucent when mixed with a substantially clear and translucent liquid. Carieri also discloses that other liquids could be utilized in place of water (column 2, lines 27-30) and that beer or kvass could be used as foaming agents (column 2, lines 15-18), which would give the beverage some alcohol content as well as some carbonation. Additionally, "Pass the Gas" discloses that it was known to mix protein mixes, such as that of Carieri or Optimum Nutrition with substantially clear and translucent liquids that contained ethyl alcohol within the claimed range, such as whiskey. Therefore, it would have been obvious to mix the protein mixes of Carieri or Optimum Nutrition with an alcoholic liquid, such as whiskey, as taught by "Pass the Gas," in order to provide a nutritional beverage that also has a desirable taste and provides the enjoyable recreational effects associated with alcohol.

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In regard to claims 17, 21 and 22, the non-brewed beverages of both Carieri and Optimum Nutrition contain the claimed amounts of vitamins B2, E, B1 (thiamin), B6, B12 and A, iron, calcium and zinc (Carieri, column 3, line 64-column 4, line 7).

In regard to claims 18-20, Carieri discloses soy protein (column 2, lines 15-16 and column 3, line 37) and Optimum Nutrition discloses whey protein. Hydrolyzed rice protein is conventional in the food art and would have been an obvious alternative source of hydrolyzed protein.

In regard to claims 23-25, Carieri discloses the inclusion of fruit juice (column 2, lines 15-18 and 27-30), which contains sucrose and fructose as well as flavors such as those claimed. Optimum Nutrition discloses the inclusion of several artificial flavors and it would have been obvious to flavor the beverage with any conventional flavoring in order to achieve the desired taste.

In regard to claim 26, Carieri does not explicitly disclose the beverage containing caffeine but does disclose that the powder can be mixed with several liquids. Optimum Nutrition discloses the beverage comprising cocoa, which contains caffeine and would be expected to provide the beverage with the claimed amount. Therefore, it would have been obvious to include caffeine in the beverage of Carieri, as taught by Optimum Nutrition, in order to provide a desired taste/flavor while also increasing the consumer's energy level.

In regard to claim 28, Carieri discloses the beverage comprising ascorbic acid (column 3, lines 43).

Claims 34 rejected under 35 U.S.C. 103(a) as being unpatentable over Sfat in view of Rubelmann et al., U.S. Patent 5,962,045. Sfat does not disclose the beverage containing vitamin C. Rubelmann discloses that the addition of vitamin C to beer can restrict the reaction of the beer with oxygen, thereby preserving the flavor (column 1, line 38-column 2, line 3). Therefore, it would have been obvious to add vitamin C to the beer of Sfat in order to achieve the same advantage.

Response to Arguments

Applicant's arguments with respect to claims 16-28 and 33-35 have been considered but are moot in view of the new ground(s) of rejection.

Conclusion


Any inquiry concerning this communication or earlier communications from the examiner should be directed to Sarah L. Kuhns whose telephone number is 571-272-1088. The examiner can normally be reached on Monday-Friday from 8:00 am - 4:30 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached at 571-272-1398. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

SLK


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